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No. 84-1971

In the Supreme Court of the United States

October Term, 1984

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and As Representatives of All Producers and Royalty Owners to Whom Sun Oil Company Has Made or Should Make Payment of Suspended Proceeds of Royalties Pursuant to FPC Opinions or FERC,
Respondents.

REPLY BRIEF OF PETITIONER

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REPLY OF PETITIONER TO BRIEF IN OPPOSITION

On June 26, 1985, this Court decided *Phillips Petroleum Co. v. Shutts,* ..... U.S. ....., 86 L.Ed.2d 628, 105 S.Ct. 2965 (No. 84-233, June 26, 1985), which was virtually a companion case to our present case, being argued and decided by the Kansas Supreme Court shortly after it decided *Shutts.* In *Shutts,* this Court reversed in part and remanded for further proceedings.

Respondents' brief in opposition seeks to avoid this Court's holding in *Shutts,* that application of Kansas law

to out of state claims by nonresidents, identical to those in the instant case, is "sufficiently arbitrary and unfair as to exceed constitutional limits." ..... U.S. ....., 86 L.Ed.2d 628, 648, Slip Opinion, p. 21. As in *Shutts,* the Kansas courts in our case also "applied Kansas contract and Kansas equity law to every claim in this case," (86 L.Ed.2d at 643, *Shutts* slip opinion, p. 17) notwithstanding virtually all claims and all class members had no connection with Kansas. (Petition, pp. A5, A8) Respondents' invocation of equitable principles, which would turn Kansas law into a federal common law, is inappropriate in view of the federal constitutional principles applied in *Shutts.* It is not, therefore, necessary for us to point out Respondents' exaggeration and distortion of equitable principles, and Respondents' failure to state the countervailing equities which other states do recognize in their own laws which differ from Kansas law.

While this Court's *Shutts* decision requires a reversal of the Kansas court's failure to apply the applicable law of other states in this class action, there remain two material factual differences in the instant case, which, essentially ignored by Respondents, require separate attention.

(1) Apparently because the Kansas court treated the out of state claims as though they had arisen in Kansas, applying substantive Kansas law, the court also ignored the applicable statutes of limitations of its sister states by applying the Kansas five year statute of limitations relating to written contracts. (Petition, p. A11) We have pointed out that the states having the greatest number and amount of claims would have barred that portion of the interest claims relating to royalties paid out after FPC opinion nos. 699 and 699H became final. (Petition, pp. 13-15)

Yet the Kansas court ignored its own limitations "borrowing" statute, which adopts a sister state's limitation statute if the specified time limit is shorter than the applicable Kansas statute, to claims arising in other states unless the claim is held by a Kansas resident. (Petition, p. 13) These widespread "borrowing" statutes, enacted in almost every jurisdiction (See, 51 *Am.Jur.2d,* Limitation of Actions, Sec. 67, p. 646) properly preserved each state's policies applicable to claims governed by that state's laws. Yet the ruling below, ignoring the governing laws of other states, has also refused to effectuate important policies of those states embodied in their statutes of repose.

As noted by this Court in *Keeton v. Hustler Magazine, Inc.,* 465 U.S. ....., 104 S.Ct. 1473, 1480 n.10 (1984): "There has been considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation." The Court did not there find it necessary to decide the issue. This case, thus, presents an opportunity for this Court to speak definitively on whether a State's application of its own statute of limitations, to wholly foreign claims, "rises to the level of a due process violation."

(2) In *Shutts,* class members were provided "opt out" or "request for exclusion" forms appended to the notice of the class action sent to them. This Court held: "Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts,* 86 L.Ed.2d at 643, slip opinion p. 14.

In the instant case, there was no such request for exclusion form supplied to the absent plaintiffs. (R. Vol. 1,

p. 67) Here, the notice contained within its text the mere recitation that "any person or concern so included [in the class] may by filing a written request to the Clerk of the District Court of Barber County, Kansas, Medicine Lodge, Kansas 67104, on or before the 5th day of April, 1983, be excluded from the class unless upon notice and after hearing and for stated reasons the court finds that inclusion is essential to the fair and efficient adjudication of the controversy." [The district court Notice is reproduced at the end of this Reply Brief.]

Since the absent class member's only information about the case is derived from the notice, the same due process requirement of a form which can be utilized to request exclusion, laid down in *Shutts*, supra, is equally applicable here. Thus, the failure to provide an "opt out" form constitutes a denial of procedural due process under the Federal Constitution which invalidates the judgment below.

CONCLUSION

Since the Kansas court held that its *Shutts* decision governed the result in the instant case, the partial reversal and remand by this Court in that case logically requires that a writ of certiorari issue in this case also, so that the cases will be decided consistently.

The denial of due process in failing to provide "opt out" forms to class members requires also that the judgment below be held void in its entirety as to all absent class members.

Therefore, the Court should reverse and remand with directions to set aside the judgment below. The remand and reversal should also direct the Kansas court, in future proceedings, to apply the interest laws and the limitations statutes of the states in which the claims arose.

Respectfully submitted,

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ADDENDUM

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC Opinions, Plaintiffs,	)	
vs.	)	No. 79C40
SUN OIL COMPANY, a Delaware Corporation, Defendant.	)	

NOTICE OF CLASS ACTION SUIT

TO: All royalty owners and overriding royalty owners to whom Sun Oil Company (Sun) made payment of suspended royalties in 1975 through 1979, pursuant to Federal Power Commission Opinion Nos. 586, 699, 699H, 749, 749C, 770 and 770A.

This suit was filed in August, 1979, by plaintiffs, individually and on behalf of all royalty owners and overriding royalty owners to whom this notice is directed. Plaintiffs ask judgment against defendant for the payment of interest on suspended royalties paid by defendant in 1975 through 1979 attributable to increased gas sales prices received and withheld and used by defendant subsequent to August 2?, 1974. The leases involved are Sun's leases, nationwide. There are in excess of 1,000 gas royalty owners and overriding royalty owners who are members of the

proposed class and the above mentioned payments were in excess of $3,000,000.00.

Defendant Sun has denied any liability to plaintiffs or members of the class herein described.

The court has held that this action is to be maintained as a class action. Accordingly:

1. The court will include as members of plaintiff class herein all of the gas royalty owners and overriding royalty owners addressed above; provided, however, any person or concern so included may by filing a written request to the Clerk of the District Court of Barber County, Kansas, Medicine Lodge, Kansas 67104, on or before the 5th day of April, 1983, be excluded from the class unless upon notice and after hearing and for stated reasons the court finds that inclusion is essential to the fair and efficient adjudication of the controversy. Any class member, if so desired, may appear in the case in person or through his own counsel; otherwise, plaintiffs' counsel will represent him as a member of plaintiff class.

2. Judgment in this action, whether for the plaintiff class or for the defendant, will be binding on all class members except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to plaintiff class.

3. Plaintiffs' attorneys' fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys, not exceeding 1/3rd, out of the interest fund created. If plaintiffs are unsuccessful, there will be no allowance of attorneys' fees, costs or expenses against you.

4. If you want further information, please do not call the Judge or Clerk of the Court, but call or write one of the attorneys listed below.

Dated: March 1, 1983.

CLARENCE E. RENNER, District Judge

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